

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY ALEXANDER,	:	CIVIL ACTION
GAIL ALEXANDER, h/w	:	
	:	
v.	:	NO. 03-1511
	:	
NATIONAL FIRE INSURANCE OF	:	
HARTFORD	:	
v.	:	
	:	
SHELBY INSURANCE COMPANY,	:	
	:	
UNITED STATES FIDELITY AND	:	
GUARANTY COMPANY	:	

**MEMORANDUM AND ORDER**

**Juan R. Sánchez, J.**

**January 19, 2005**

In this insurance case, the court must determine which of three companies provides primary and which provides excess coverage for injuries resulting from the collapse of a second-floor balcony at Jeffrey and Gail Alexander's Sea Isle City, New Jersey, beach house.

This is the second summary judgment action in this case. The Hon. Michael F. Baylson previously determined National Fire Insurance of Hartford was obliged to cover some portion of the liability for the accident but reserved a decision on whether the policy provided excess or primary coverage.<sup>1</sup> *Alexander v. National Fire Ins. of Hartford*, 2004 WL 765639, 10 (E.D. Pa. 2004). The question was reserved to allow National Fire to join United States Fidelity and Guaranty Company (USF&G) and Shelby Insurance Company.

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<sup>1</sup>National Fire misconstrues Judge Baylson's decision when it argues collateral estoppel bars finding it is the primary insurer. Judge Baylson found National Fire was obligated to cover the Alexanders and specifically reserved the question of whether it was a primary or excess carrier

The Alexanders purchased two insurance policies, one from Shelby covering an “additional residence rented to others,” and one from USF&G, a homeowner’s insurance policy, covering the Alexanders’s primary residence.<sup>2</sup> The policies issued by Shelby Insurance and USF&G are substantially the same regarding the primacy of coverage. The Shelby policy covering the rental unit and the USF&G policies provide:

Other insurance – Coverage E – Personal Liability. This insurance is excess over other valid and collectible insurance except insurance written specifically to cover as excess over the limits of liability that apply in this policy.

Shelby policy, Section II Conditions, ¶ 8, p. 17; USF&G policy, Section II Conditions, ¶ 8, p. 14.

In addition, the Alexanders are listed as additional insureds on a general liability policy the Sunny Side Up Condominium Association purchased from National Fire. The National Fire policy provides:

#### 4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

##### a. Primary Insurance

This insurance is primary except when b. below applies . . .

##### b. Excess insurance

This insurance is excess over :

...

(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment or endorsement.

National Fire policy, Section IV, ¶ 4, pp. 8-9.

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<sup>2</sup> The Alexanders also purchased an umbrella policy for personal liability from Shelby which is not here relevant since it is excess by its plain language.

The National Fire policy defines “you” and “your” as referring to the “Named insured shown in the declarations.” USF&G policy, p. 1. Thus, the excess clause refers only to the Condominium Association because the Condominium Association is the named insured on the National Fire policy. The question remains whether National Fire’s, Shelby’s or USF&G’s primary clause controls.

## **DISCUSSION**

The court previously held New Jersey law applies to the case. An insurance policy is “read as the ordinary policy-holder would understand it.” *Kissil v. Beneficial Nat’l Life Ins. Co.*, 64 N.J. 555, 561, 319 A.2d 67 (1974). “The task of interpreting a contract of insurance is generally performed by a court rather than by a jury, which must read the insurance policy as a whole and construe it according to the plain meaning of its terms.” *Gibson v. Callaghan*, 158 N.J. 662, 730 A.2d 1278, 1278 (N.J. 1999). As a question of law, the interpretation of a provision in an insurance contract is properly made on a motion for summary judgment. *Weedo v. Stone-E-Brick, Inc.*, 155 N.J. Super. 474, 382 A.2d 1152 (N.J. Super. 1977), *reversed on other grounds*, 81 N.J. 233, 405 A.2d 788 (N.J. 1979). Clear and unambiguous terms in an insurance contract must be given their plain and ordinary meaning. *Ambrosio v. Affordable Auto Rental, Inc.*, 307 N.J. Super. 114, 704 A.2d 572, 575 (N.J. Super. 1998). The terms of each policy determine whether coverage is primary, co-primary, or excess. *Royal Ins. Co. v. Rutgers Cas. Ins. Co.*, 271 N.J. Super. 409, 419, 638 A.2d 924, 929 (N.J. Super. 1994).

National Fire argues New Jersey law gives effect to an excess policy over a policy that does not claim to be excess. *American Reliance Insurance Co. v. American Casualty Company of Reading, Pa.*, 294 N.J. Super. 238, 240, 683 A.2d 205, 206 (N.J. Super. 1986). Then, the undifferentiated policy becomes primary. *Id.* When both policies provide they are excess, the provisions cancel each other and both policies become primary. *Cosmopolitan Mutual Insurance*

*Company v. Continental Casualty Company*, 28 N.J. 554, 562, 147 A.2d 529, 533 (N.J. 1959); *see also* 280 N.J. Super. 414, 655 A.2d 931 (N.J. Super. 1995).

The argument made by Shelby and USF&G conforms more closely to the plain language of the policies. The plain language of the Shelby and USF&G policies make them excess over other insurance available to the Alexanders. The National Fire policy is “other insurance available to the insured” because the National Fire policy provides that it is primary unless a named insured has other insurance covering liability.

The National Fire policy defines “you” and “your” as the named insured. The Sunny Side Up Condominium Association is the named insured on the National Fire policy and the Alexanders are additional insureds. Therefore, the National Fire policy is primary with respect to the Alexanders because the excess clause refers only to the named insureds, not to additional insureds.

Accordingly, we enter the following:

### **ORDER**

And now this 19<sup>th</sup> day of January, 2005, it is hereby ORDERED that the Motion for Summary Judgment by Shelby Casualty Insurance Company and USF&G (Document 39) is GRANTED. It is further ORDERED:

1. Defendant/Third Party Plaintiff National Fire Insurance of Hartford is obligated to provide primary coverage to the Alexanders in connection with the lawsuits pending and/or settled against them relating to the August 26, 2001 deck collapse at 21 51<sup>st</sup> Street, Sea Isle City, NJ;
2. National Fire Insurance of Hartford is to reimburse Shelby Casualty Insurance Company and USF&G for all legal fees incurred and/or expended in defense of the lawsuits pending and/or settled against the Alexanders relating to the August 26,

2001 deck collapse at 21 51<sup>st</sup> Street, Sea Isle City, NJ;

3. National Fire Insurance of Hartford is to reimburse Shelby Casualty Insurance Company and USF&G for any payments made to settle and/or satisfy judgments entered against the Alexanders in connection with the lawsuits pending and/or settled against them relating to the August 26, 2001 deck collapse at 21 51<sup>st</sup> Street, Sea Isle City, NJ.

BY THE COURT:

\s\ Juan R.Sánchez

Juan R. Sánchez, J.